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No. 405

In the Supreme Court of the United States

OCTOBER TERM, 1961

SATIRIS G. FASSOULIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals which incorporates the oral opinion of the district court (Pet. App. 1–17) is not yet reported. The opinion of the district court on petitioner's motion to dismiss the indictment (R. 28–32) [1] is reported at 179 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1961 (R. 400). A petition for rehearing was denied on August 14, 1961 (R. 420). The petition for a writ of certiorari was filed on September 13,

[1] "R." refers to the Appellant's Appendix in the court below.

1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction.

2. Whether there was a prejudicial variance between the indictment and the proof.

3. Whether the indictment charged an offense.

4. Whether petitioner was denied the right to a speedy trial.

STATUTE AND RULE INVOLVED

Title 18 of the United States Code, Section 1343, at the time of the offense,[2] provided as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 48, F. R. Crim. P., provides:

> (a) * * * The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information

[2] This "wire fraud" statute was added to the Criminal Code by Section 18 of the Communications Act Amendments, 1952, 66 Stat. 722. It was amended, subsequent to the allegations of the instant indictment, by the Act of July 11, 1956, 70 Stat. 523, to cover communications in foreign as well as interstate commerce.

or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) * * * If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

On October 1, 1959, an indictment was filed against petitioner in the United States District Court for the Southern District of New York, charging a violation of the wire fraud statute (R. 5-7). In a non-jury trial, the petitioner was found guilty and sentenced to imprisonment for two years (R. 380).

The scheme charged was one to cause A. Mitchell Liftig, the First National Bank of Akron, Ohio, and the Chemical Corn Exchange Bank of New York to give assets to the Continental Chartering and Shipping Corporation. The indictment charged, as the specific false representations and promises used to carry out the scheme, false statements as to assets owned or available to petitioner and false representations as to the genuineness of 346 counterfeit $1,000 American Telephone and Telegraph debentures which were to be deposited as collateral for a loan of $350,000 from the First National Bank of Akron to the Continental Corporation. Finally the indictment alleged that, for the purpose of executing the scheme, petitioner, on December 15, 1955, caused an interstate telephone call

and telegram to be sent from Akron to New York authorizing the payment of $350,000 on deposit of the debentures (R. 5–7).

The evidence is summarized in the opinion of the district court which was adopted by the court of appeals (Pet. App. 6–17). It shows that, in the fall of 1955, petitioner made numerous efforts to induce A. Mitchell Liftig to contribute stock from four corporations in which he had substantial interests to the Continental Chartering and Shipping Corporation (R. 62–63). Petitioner, at the time, had an agreement that, on the repayment of an outstanding loan, he would reacquire the stock of the Whitehead Corporation, a shipping company which owned the S.S. Harold Whitehead (R. 58–59). In order to convince Liftig to merge his companies, petitioner made a large number of false representations, both oral and documentary, to the effect that he owned or controlled a shipping corporation, Amerex Steamship Corporation and the S.S. Amerosia, and that he had obtained charters on two ships from the Alcoa Steamship Corporation (R. 65–67). The corporation and charters were non-existent (R. 102, 164–165, 214). In the course of various negotiations with Liftig, petitioner also produced fictitious proposed contracts and falsely stated that two prominent lawyers were involved in the proposed transactions (R. 52, 81, 103, 137, 143, 148–149, 165). Petitioner also agreed that, prior to Liftig's transfer of his assets, he would repay the loan, obtain the Whitehead shares, transfer these shares to Continental and have a char-

ter on the Whitehead (R. 62–65, 108–109, 124–126, 186, 206).

In December 1955, petitioner represented that the National Bulk Carriers, one of the world's largest shipping companies, was interested in buying the charters and the Amerex stock owned by his Continental Corporation (R. 75–77, 136–140). He arranged for Continental to take steps to redeem Whitehead stock. He misrepresented that James Eichler, a fictitious person, was a relative of a prominent shipping man who was preparing to buy the charters and stock by paying, in lieu of cash, certain American Telephone and Telegraph debentures (R. 77–86, 144–145). Petitioner thereupon produced 346 counterfeit A.T. & T. debentures (R. 88–90).

A New York attorney who represented petitioner and Liftig arranged a $350,000 loan for Continental with an Akron bank (R. 87–89, 147–150, 175–176). On December 14, 1955, petitioner was informed that information concerning the New York bank that was to receive the bonds and pay out the $350,000 was to be sent from the Akron bank to the New York bank. On December 15, 1955, petitioner met Liftig at the attorney's office to wait for instructions from the Akron bank as to the place in New York where the proceeds of the loan would be obtained and was there informed that a telegram was to be sent (R. 158–159, 170, 173–174).

On the same day, a vice president of the Akron bank telephoned the Chemical Corn Exchange Bank in New York authorizing the delivery of the money

on the loan (R. 216–218, 230–231, 238). He also sent a telegram confirming the telephone conversation (R. 219–220, 231–232, 234). The money was delivered to Continental after the collateral was posted, and Liftig signed a note as its president (R. 92–93, 150). After part of the loan proceeds were used to pay petitioner's oustanding debts, the Whitehead stock was placed in escrow pending further payment of an undetermined amount (R. 94–96, 129, 194–195, 202).

On December 21, 1955, after the New York Times published an article stating that counterfeit A.T. & T. bonds were in circulation, petitioner contacted Liftig and informed him that the bonds were spurious (R. 97–99). Petitioner never disclosed the source of the counterfeit debentures (R. 98, 101, 161–162, 242–244).

ARGUMENT

1. There is no validity to petitioner's contention that the evidence was insufficient to sustain his conviction.

(*a*) Petitioner claims that, since Liftig lost no money, there was merely an attempt to defraud, which was an act not covered by the statute (Pet. 28–31). But Liftig was not the only victim named in the indictment; the banks were named as well. Petitioner deliberately and successfully led the banks to accept counterfeit securities as genuine securities and to lend money thereon. The banks were therefore actually defrauded.

Moreover, the offense charged is the use of interstate wire communication in a scheme to defraud. A

communication made for the purpose of executing a scheme does not require a successful fraud. See *United States* v. *Sylvanus*, 192 F. 2d 96, 106 (C.A. 7), certiorari denied, 342 U.S. 943; *United States* v. *Feldman*, 136 F. 2d 394, 396 (C.A. 2), affirmed on other grounds, 322 U.S. 487; *Hoffman* v. *United States*, 249 F. 2d 338, 341 (C.A. 9).

(*b*) Petitioner further claims that the evidence did not show that he caused an interstate call to be made (Pet. 23–27). He maintains that he did not know and could not reasonably be held to have foreseen that an interstate wire communication rather than some other communication would result from his delivery of the counterfeit debentures as security for a loan (Pet. 23–27). But interstate communication between the New York and Akron banks was clearly within the contemplation of the scheme, and it was reasonably foreseeable that this interstate communication would be by wire. Cf. *Pereira* v. *United States*, 347 U.S. 1, 8.

In addition, petitioner asserts that the evidence was insufficient to show the telephone call was interstate between Akron and New York (Pet. 32–34). Heller of the Akron bank testified, however, that after receiving a letter addressed to "First National Bank of Akron, Akron, Ohio," and other documents, he "called the Chemical Bank, Mr. Rommel." (Pet. App. 4; R. 216–218.) Rommel of the New York bank also testified as to the telephone call (R. 229–230). Furthermore, the confirmatory telegram showed the locations of the banks. Thus, there was ample evidence that the call was interstate.

2. Petitioner's second major contention is that there was a fatal variance between the indictment and the proof because the indictment charged a scheme whereby Liftig would contribute assets owned by him to the Continental Chartering & Shipping Corporation, and the proof showed that Liftig was to contribute the assets of four corporations in which he owned a minority interest and was authorized to act for the other interests. He argues that, had he known that the corporations were the intended victims, he would have altered his trial preparation (Pet. 19–23).

Petitioner does not attempt to show how he was misled. Insofar as he claims that he would have altered his tactics, the bill of particulars informed him that the assets which Liftig was to contribute consisted of the stock and assets of four named companies (R. 42). *Stirone* v. *United States,* 361 U.S. 212, did not change the requirement that a variance between allegation and proof must be significant.

3. Petitioner also asserts (Pet. 31) that allegations in the indictment that, in order to execute the scheme, he caused "to be transmitted in interstate commerce, by means of interstate wire, to wit, telephone and telegraph, from Akron, Ohio to New York, New York, * * * certain sounds * * *" (R. 7) do not charge an offense under the statute. The statute, in effect at the time of the offense, forbade any person from causing "to be transmitted by means of interstate wire * * * any * * * sounds" for the purpose of executing a fraudulent scheme.[3] A person who causes the trans-

[3] The 1956 amendment changed the wording to forbid the transmittal "by means of wire * * * in interstate or foreign

mittal of telephone and telegraph sounds "in interstate commerce, by means of interstate wire" clearly causes the transmittal of such sounds "by means of interstate wire."

4. Petitioner finally contends that he was denied a speedy trial (Pet. 13–19) because of delay between the filing of the complaint and the return of the indictment. On December 28, 1955, a complaint was filed before a United States Commissioner, charging petitioner with wire fraud. On January 11, 1956, the preliminary examination was waived, and a few days later petitioner was released on bond and has been at liberty since that time (R. 18, 29, 248). No motion to dismiss the complaint or to exonerate the bail bond was filed (R. 24). On October 1, 1959, the indictment was returned (R. 8). Petitioner was represented by the same attorney from the time he was apprehended under the complaint through his trial (R. 24, 46). After indictment, he filed a motion to dismiss, alleging a denial of a speedy trial and an unnecessary delay in presenting the charge to the grand jury (R. 16–21).[4] The district court denied this motion on the

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commerce." It was "designed to close a loophole in the present law, which limits the prosecution of frauds involving wire, radio, and television communication to interstate transactions only. It would extend this coverage to foreign communications as well." H. Rep. No. 2385, 84th Cong., 2d Sess., p. 1; see S. Rep. No. 1873, 84th Cong., 2d Sess. The bill was specifically designed to reach communications from Mexico and Canada to the United States.

[4] The record does not disclose the reason for the delay in returning the indictment. It indicates that Fassoulis would not name the source of the counterfeit bonds (R. 98, 101, 161–162, 242–244) and that similar spurious debentures were found in scattered parts of the country (R. 22). It further shows that

ground that petitioner never complained of the delay, nor demanded a speedy trial, until after his indictment and that he failed to move to dismiss the complaint under the provisions of Rule 48(b), F. R. Crim. P. (R. 28–30). The court below affirmed upon the opinion of the trial court (Pet. App. 5–6). This ruling was correct.

(*a*) Rule 48, F. R. Crim. P., provides a remedy for delay between indictment and complaint. It provides that, "[i]f there is unnecessary delay in presenting the charge to a grand jury * * * against a defendant who has been held to answer to the district court * * *, the court may dismiss the * * * complaint".[5] The failure to take action under this rule precludes a subsequent objection to the delay. This principle is similar to the well settled rule that, even when there has been delay between indictment and trial, a defendant who does not demand an early hearing is not denied a speedy trial. See *United States* v. *Lustman,* 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Kaye,* 251 F. 2d 87 (C.A. 2), certiorari denied, 356 U.S. 919; *Pietch* v. *United States,* 110 F. 2d 817 (C.A. 10), certiorari denied, 310 U.S. 648; *Collins* v. *United States,* 157 F. 2d 409 (C.A. 9); *Shepherd* v. *United States,* 163 F. 2d 974, 977 (C.A. 8).

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defense witness Matthew Fox testified before the grand jury on April 24, 1959 (R. 308).

[5] Petitioner's argument made below that this Rule has no application to a complaint (R. 39–41) is refuted, not only by its plain language, but by the Note of the Advisory Committee on subdivision (a) of Rule 48.

(*b*) Petitioner is not aided (see Pet. 19) by the dictum in *Smith* v. *United States*, 360 U.S. 1, 10, that if "arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment." In the first place, petitioner was on bail before and during trial, except for a few days following his arrest. Moreover, the mere passage of time was not prejudicial to petitioner. The indictment was returned well within the five-year period of limitations fixed by Congress (18 U.S.C. 3282). The record indicates that petitioner had a fair trial. He was at all times represented by competent counsel. Although his use of fictitious documents and non-existent persons was the strongest evidence against him, he did not claim that the documents were genuine or that the persons were in existence. He therefore had no basis for claiming any injury due to loss of memory or loss of documents.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961